



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

CASE OF JORGIC v. GERMANY

(Application no. 74613/01)

JUDGMENT

STRASBOURG

12 July 2007

FINAL

12/10/2007

In the case of Jorgic v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,
Snejana Botoucharova,
Volodymyr Butkevych,
Margarita Tsatsa-Nikolovska,
Rait Maruste,
Javier Borrego Borrego,
Renate Jaeger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 June 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 74613/01) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Bosnia and Herzegovina, of Serb origin, Mr Nicola Jorgic (“the applicant”), on 23 May 2001.

2. The applicant was represented before the Court by Mr H. Grünbauer, a lawyer practising in Leipzig. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice, assisted by Mr G. Werle, Professor of Law at Humboldt University in Berlin.

3. The applicant, relying on Article 5 § 1 (a) and Article 6 § 1 of the Convention, alleged that the German courts had not had jurisdiction to convict him of genocide. He further argued that, due, in particular, to the domestic courts’ refusal to call any witness for the defence who would have had to be summoned abroad, he had not had a fair trial within the meaning of Article 6 §§ 1 and 3 (d) of the Convention. Moreover, he complained that his conviction for genocide was in breach of Article 7 § 1 of the Convention, in particular because the national courts’ wide interpretation of that crime had no basis in German or public international law.

4. On 7 July 2005 the Court decided to give notice of the application to the Government. On 2 October 2006 it decided to examine the merits of the application at the same time as its admissibility under the provisions of Article 29 § 3 of the Convention taken in conjunction with Rule 54A § 3 of the Rules of Court.

5. The Government of Bosnia and Herzegovina, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the

Convention and Rule 44) did not indicate that they wished to exercise that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1946. When he lodged his application, he was detained in Bochum, Germany.

1. Background to the case

7. In 1969 the applicant, a national of Bosnia and Herzegovina of Serb origin, entered Germany, where he legally resided until the beginning of 1992. He then returned to Kostajnica, which forms part of the city of Doboj in Bosnia, where he was born.

8. On 16 December 1995 the applicant was arrested when entering Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide.

2. Proceedings in the Düsseldorf Court of Appeal

9. On 28 February 1997 the applicant's trial, on the charge of having committed genocide in the Doboj region between May and September 1992, started before the Düsseldorf Court of Appeal (*Oberlandesgericht*) acting as a court of first instance.

10. In the course of the proceedings the Court of Appeal heard evidence from six witnesses called by the prosecution, who had to be summoned abroad.

11. On 18 June 1997 the applicant requested the Court of Appeal to call and hear evidence from eight witnesses from Kostajnica for the purpose of proving the fact that he had been placed in pre-trial detention in Doboj between 14 May and 15 August 1992 and could not therefore have committed the crimes he was accused of. On 10 July 1997 the applicant sought leave to summon another seventeen witnesses from Kostajnica to prove his allegation.

12. On 18 August 1997 the Court of Appeal dismissed the applicant's requests to summon these witnesses. Relying on Article 244 § 5, second sentence, of the Code of Criminal Procedure (see paragraph 39 below), it considered the testimony of these witnesses to be of little evidential value. Seven of these witnesses had made written statements which had already been read out in court. Only one of them had actually claimed to have visited the applicant in prison. Having regard to the evidence already taken,

the court could exclude the possibility that the testimony of the witnesses named by the applicant, if heard in person, might influence the court's assessment of the evidence. It pointed out that more than twenty witnesses who had already been heard in court, including two journalists who had not been victims of the crimes the applicant was accused of, had seen the applicant in different places outside prison during the time he claimed to have been detained. The documents submitted by the applicant in relation to the beginning and end of his detention in Doboј did not warrant a different conclusion, as they had obviously been signed by a person whom the applicant knew well.

13. On 8 September 1997 the applicant requested the court to call three witnesses from Doboј in order to prove that he had been detained between 14 May and 15 August 1992. He also requested an inspection of the scene of the crime (*Augenscheinseinnahme*) in Grabska or, alternatively, that a topographical map be drawn up in order to prove that the witnesses' statements concerning his purported acts in Grabska were untrustworthy.

14. On 12 September 1997 the Court of Appeal rejected the applicant's requests. As regards the refusal to summon the three witnesses named, the court, again relying on Article 244 § 5 of the Code of Criminal Procedure, found that the testimony of these witnesses would be of little evidential value. Having heard the evidence given by other witnesses, it was satisfied that the applicant had not been detained at the material time. It further considered an inspection of the scene of the crime or the drawing-up of a topographical map thereof to be unobtainable evidence (*unerreichbare Beweismittel*) within the meaning of Article 244 § 3 of the Code of Criminal Procedure (see paragraph 38 below), which it therefore did not have to accept.

15. In its judgment of 26 September 1997, the Düsseldorf Court of Appeal convicted the applicant on eleven counts of genocide (Article 220a nos. 1 and 3 of the Criminal Code – see paragraph 34 below) and for the murder of twenty-two people in one case, seven people in another case, and one person in a third case. In the remaining cases, he was convicted on several counts of dangerous assault and deprivation of liberty. It sentenced the applicant to life imprisonment and stated that his guilt was of a particular gravity (see paragraph 37 below).

16. The court found that the applicant had set up a paramilitary group, with whom he had participated in the ethnic cleansing ordered by the Bosnian Serb political leaders and the Serb military in the Doboј region. He had in particular participated in the arrest, detention, assault and ill-treatment of male Muslims of three villages in Bosnia at the beginning of May and June 1992. He had killed several inhabitants of these villages. He had in particular shot twenty-two inhabitants of the village of Grabska – women and disabled and elderly people – in June 1992. Subsequently, the applicant, together with the paramilitary group he had led, had chased some

forty men from their home village and had ordered them to be ill-treated and six of them to be shot. A seventh injured person had died from being burnt with the corpses of the six people shot. In September 1992 the applicant had killed a prisoner, who was being ill-treated by soldiers in the Doboï prison, with a wooden truncheon in order to demonstrate a new method of ill-treatment and killing.

17. The court stated that it had jurisdiction over the case pursuant to Article 6 no. 1 of the Criminal Code (see paragraph 34 below). There was a legitimate link for criminal prosecution in Germany, as this was in accordance with Germany's military and humanitarian missions in Bosnia and Herzegovina and the applicant had resided in Germany for more than twenty years and had been arrested there. Furthermore, agreeing with the findings of an expert in public international law, the court found that the German courts were not debarred under public international law from trying the case. In particular, neither Article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), nor Article 9 of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) (see paragraphs 48-49 below) excluded the jurisdiction of German courts over acts of genocide committed outside Germany by a foreigner against foreigners. The court considered that this view was confirmed by the fact that the International Criminal Tribunal for the former Yugoslavia (ICTY) had stated that it was not willing to take over the applicant's prosecution.

18. Furthermore, the court found that the applicant had acted with intent to commit genocide within the meaning of Article 220a of the Criminal Code. Referring to the views expressed by several legal writers, it stated that the "destruction of a group" within the meaning of Article 220a of the Criminal Code meant destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together ("*Zerstörung der Gruppe als sozialer Einheit in ihrer Besonderheit und Eigenart und ihrem Zusammengehörigkeitsgefühl*"); a biological-physical destruction was not necessary. It concluded that the applicant had therefore acted with intent to destroy the group of Muslims in the north of Bosnia, or at least in the Doboï region.

3. Proceedings before the Federal Court of Justice

19. On 30 April 1999 the Federal Court of Justice, following an appeal by the applicant on points of law and after a hearing, convicted the applicant on one count of genocide and thirty counts of murder. It sentenced him to life imprisonment and stated that his guilt was of a particular gravity.

20. Endorsing the reasons given by the Court of Appeal, it found that German criminal law was applicable to the case and that the German courts consequently had jurisdiction over it by virtue of Article 6 no. 1 of the Criminal Code. It found, in particular, that no rule of public international

law prohibited the applicant's conviction by the German criminal courts in accordance with the principle of universal jurisdiction (*Universalitäts-/Weltrechtsprinzip*) enshrined in that Article. It conceded that the said principle had not been expressly laid down in Article VI of the Genocide Convention, despite earlier drafts of the Genocide Convention in which it had been proposed to do so. However, the said Article did not prohibit persons charged with genocide from being tried by national courts other than the tribunals of the State in the territory of which the act was committed. Any other interpretation would not be reconcilable with the *erga omnes* obligation undertaken by the Contracting States in Article I of the Genocide Convention to prevent and punish genocide (see paragraph 48 below). The aforesaid interpretation of the Genocide Convention was also confirmed by Article 9 § 1 of the ICTY Statute, which provided for concurrent jurisdiction of the ICTY and all other national courts.

21. Moreover, the Federal Court of Justice found that the German courts also had jurisdiction pursuant to Article 7 § 2 no. 2 of the Criminal Code (see paragraph 34 below).

22. The Federal Court of Justice did not expressly deal with the applicant's complaint that the Court of Appeal, in its decision of 18 August 1997, had refused to summon abroad any of the defence witnesses he had named on the basis of Article 244 § 5 of the Code of Criminal Procedure. However, it referred in general to the submissions of the Federal Public Prosecutor (*Generalbundesanwalt*), who had argued that the applicant's appeal was inadmissible in this respect, as he had failed to set out the relevant facts in sufficient detail. As regards the applicant's complaint that the Court of Appeal, in its decision of 12 September 1997, had refused to summon three further defence witnesses abroad, the Federal Court of Justice considered his complaint to be inadmissible, as he had not sufficiently set out the relevant facts and had not provided sufficient reasons in his appeal. The court further referred to the Federal Public Prosecutor's submissions regarding the applicant's complaint that the Court of Appeal had refused to have a topographical map drawn up. According to the Federal Public Prosecutor, the applicant's complaint was ill-founded in this respect, especially as the Court of Appeal already had a video of the relevant locality.

23. The Federal Court of Justice upheld the Court of Appeal's finding that the applicant had intended to commit genocide within the meaning of Article 220a of the Criminal Code, but found that his actions as a whole had to be considered as only one count of genocide. It referred to the wording of Article 220a § 1 no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) in support of its view that genocide did not necessitate an intent to destroy a group physically, but that it was sufficient to intend its destruction as a social unit.

4. *Proceedings before the Federal Constitutional Court*

24. On 12 December 2000 the Federal Constitutional Court declined to consider the applicant's constitutional complaint.

25. According to the Constitutional Court, the criminal courts had not violated any provision of the Basic Law by establishing their jurisdiction pursuant to Article 6 no. 1 of the Criminal Code taken in conjunction with Article VI of the Genocide Convention. The principle of universal jurisdiction afforded a reasonable link to deal with subject matter arising outside the territory of Germany, while observing the duty of non-intervention (*Interventionsverbot*) under public international law. The competent courts' reasoning, namely, that Article 6 no. 1 of the Criminal Code taken in conjunction with Article VI of the Genocide Convention entitled them to examine the applicant's case, was not arbitrary. It could properly be reasoned that the Genocide Convention, while not expressly regulating the principle of universal jurisdiction, provided that the Contracting Parties were not obliged to prosecute perpetrators of genocide, but had jurisdiction to do so. In fact, genocide was the classic subject matter to which the principle of universal jurisdiction applied. The criminal courts' reasoning did not interfere with Bosnia and Herzegovina's personal or territorial sovereignty, as that State had expressly refrained from requesting the applicant's extradition.

26. Pointing out that in the case of an admissible constitutional complaint it was entitled to examine the act complained of under all constitutional angles, the Federal Constitutional Court further found that the applicant's right to a fair trial as guaranteed by the Basic Law had not been violated. There was no doubt that Article 244 §§ 3 and 5 of the Code of Criminal Procedure were constitutional. The legislature was not obliged to set up specific rules of procedure for certain criminal offences. The right to a fair trial did not grant the applicant a right to have certain evidence taken, such as calling witnesses who had to be summoned abroad.

27. In respect of the interpretation of Article 220a of the Criminal Code, the Federal Constitutional Court found that there had been no violation of the principle that criminal law was not to be applied retroactively as guaranteed by Article 103 § 2 of the Basic Law. It stated that the way in which the Court of Appeal and the Federal Court of Justice had construed the notion of "intent to destroy" in the said Article was foreseeable. Moreover, the interpretation conformed to that of the prohibition of genocide in public international law – in the light of which Article 220a of the Criminal Code had to be construed – by the competent tribunals, several scholars and as reflected in the practice of the United Nations, as expressed, *inter alia*, in Resolution 47/121 of the General Assembly (see paragraph 41 below).

5. *Reopening of the proceedings*

28. On 3 July 2002 the Düsseldorf Court of Appeal declared inadmissible a request by the applicant to reopen the proceedings. The fact that one of the witnesses who had been examined by the Court of Appeal, and who was the only person claiming to have been an eyewitness to the applicant murdering twenty-two people in Grabska, was suspected of perjury did not warrant a reopening. Even assuming that the said witness had invented the allegations against the applicant, the latter would still have to be sentenced to life imprisonment for genocide and on eight counts of murder.

29. On 20 December 2002 (decision served on 28 January 2003) the Federal Court of Justice decided that the applicant's request to reopen the proceedings was admissible in so far as it concerned the murder of twenty-two people in Grabska. It pointed out, however, that, even assuming that the applicant's conviction on twenty-two counts of murder was not upheld, his conviction for genocide and on eight counts of murder, and therefore his life sentence, including the finding that his guilt was of a particular gravity, would prevail.

30. In a constitutional complaint of 28 February 2003, the applicant claimed that the decisions of the Düsseldorf Court of Appeal and the Federal Court of Justice concerning the reopening of the proceedings violated his right to liberty as guaranteed by the Basic Law. He argued that they had erred in their finding that, in the proceedings to have the case reopened, the question whether the applicant's guilt was of a particular gravity did not have to be assessed anew.

31. On 22 April 2003 the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

32. On 21 June 2004 the Düsseldorf Court of Appeal decided to reopen the proceedings in respect of the applicant's conviction for shooting twenty-two people in Grabska. It found that the only person claiming to have been an eyewitness to these murders was guilty of perjury at least in respect of some other statements. Therefore, it could not rule out the possibility that the judges then adjudicating the case would have acquitted the applicant on that charge if they had known that some statements by this witness had been false.

33. In so far as the applicant's request to reopen the proceedings was granted, the Court of Appeal discontinued the proceedings. It argued that the sentence to be expected by the applicant, if he was again found guilty of having murdered twenty-two people in Grabska, was not significantly greater than the sentence which had already been imposed upon him with binding effect for genocide. Consequently, the judgment of the Düsseldorf Court of Appeal of 26 September 1997 remained final regarding the applicant's conviction for genocide and on eight counts of murder, including the court's finding that his guilt was of a particular gravity.

II. RELEVANT DOMESTIC AND PUBLIC INTERNATIONAL LAW AND PRACTICE

1. Criminal Code

34. The relevant provisions of the Criminal Code, in their versions in force at the material time, on the jurisdiction of German courts, the crime of genocide and the gravity of a defendant's guilt provided as follows:

Article 6

Acts committed abroad against internationally protected legal interests

“German criminal law shall further apply, regardless of the law applicable at the place of their commission, to the following acts committed abroad:

1. genocide (Article 220a);

...”

Article 7

Applicability to acts committed abroad in other cases

“1. ...

2. German criminal law shall apply to other offences committed abroad if the act is punishable at the place of its commission or if the place of its commission is not subject to enforcement of criminal law and if the perpetrator

...

(2) was a foreigner at the time of the act, was found to be in Germany and, although the law on extradition would permit extradition for such an act, is not extradited because a request for extradition is not made, is rejected or the extradition is not enforceable.”

Article 220a

Genocide

“1. Whoever, acting with the intent to destroy, in whole or in part, a national, racial, religious or ethnical group as such,

(1) kills members of the group,

(2) causes serious bodily or mental harm ... to members of the group,

(3) places the group in living conditions capable of bringing about their physical destruction in whole or in part,

(4) imposes measures which are intended to prevent births within the group,

(5) forcibly transfers children of the group into another group,
shall be punished with life imprisonment.

...”

35. Article 220a of the Criminal Code was inserted into the German Criminal Code by the Act of 9 August 1954 on Germany’s accession to the Genocide Convention and came into force in 1955. Article 6 no. 1 and Article 220a of the Criminal Code ceased to be effective on 30 June 2002 when the Code on Crimes against International Law (*Völkerstrafgesetzbuch*) came into force. Pursuant to Article 1 of the new Code, it applies to criminal offences against international law such as genocide (see Article 6 of the new Code) even when the offence was committed abroad and bears no relation to Germany.

36. The applicant is the first person to be convicted of genocide by German courts under Article 220a since the incorporation of that Article into the Criminal Code. At the time the applicant committed his acts in 1992, a majority of scholars took the view that genocidal “intent to destroy a group” under Article 220a of the Criminal Code had to be aimed at the physical-biological destruction of the protected group (see, for example, A. Eser in Schönke/Schröder, *Strafgesetzbuch – Kommentar*, 24th edition, Munich 1991, Article 220a, §§ 4-5 with further references). However, a considerable number of scholars were of the opinion that the notion of destruction of a group as such, in its literal meaning, was wider than a physical-biological extermination and also encompassed the destruction of a group as a social unit (see, in particular, H.-H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, ZStW 66 (1954), p. 213, and B. Jähnke in *Leipziger Kommentar, Strafgesetzbuch*, 10th edition, Berlin, New York 1989, Article 220a, §§ 4, 8 and 13).

37. Under Article 57a § 1 of the Criminal Code, a sentence to life imprisonment may only be suspended on probation if, in particular, fifteen years of the sentence have been served and the particular gravity of the defendant’s guilt (*besondere Schwere der Schuld*) does not warrant the continued execution of the sentence.

2. Code of Criminal Procedure

38. Pursuant to Article 244 § 3 of the Code of Criminal Procedure, an application to adduce evidence may be rejected only under the conditions set out in that Article. It may be dismissed, *inter alia*, if the evidence is unobtainable (*unerreichbar*).

39. Article 244 § 5, second sentence, of the Code of Criminal Procedure lays down special conditions for rejecting an application to examine a witness who would have to be summoned abroad. These conditions are less

strict than those for rejecting an application to hear evidence from a witness who can be summoned in Germany. It is sufficient that the court, in the proper exercise of its discretion, deems the examination of the witness not to be necessary for establishing the truth.

3. *Comparative and public international law and practice*

(a) **Definition and scope of the crime of genocide**

(i) *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)*

40. The relevant provision of the Genocide Convention, which came into force for Germany on 22 February 1955, provides:

Article II

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

(ii) *Resolution of the United Nations General Assembly*

41. In its Resolution 47/121 (no. A/RES/47/121) of 18 December 1992 concerning the situation in Bosnia and Herzegovina in 1992, the United Nations General Assembly stated:

“Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of “ethnic cleansing”, which is a form of genocide, ...”

(iii) *Case-law of the International Criminal Tribunal for the former Yugoslavia*

42. In the case of *Prosecutor v. Krstić*, IT-98-33-T, judgment of 2 August 2001, §§ 577-80, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), expressly diverging from the wider interpretation of the notion of “intent to destroy” by the United Nations General Assembly and the Federal Constitutional Court in its judgment of 12 December 2000 in the present case, found as follows with regard to the Genocide Convention:

“577. Several recent declarations and decisions, however, have interpreted the intent to destroy ... so as to encompass evidence relating to acts that involved cultural and other non-physical forms of group destruction.

578. In 1992, the United Nations General Assembly labelled ethnic cleansing as a form of genocide. ...

579. The Federal Constitutional Court of Germany said in December 2000 that

the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group ... the intent to destroy the group ... extends beyond physical and biological extermination ... The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group. ...

580. The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”

43. The Trial Chamber’s judgment was upheld in this respect by the judgment of 19 April 2004 rendered by the Appeals Chamber of the ICTY, IT-98-33-A, which found:

“25. The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. ... The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. ...”

33. ... The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of ‘other culpable acts systematically directed against the same group’.”

44. Similarly, in the case of *Prosecutor v. Kupreškić and Others* (IT-95-16-T, judgment of 14 January 2000, § 751), which concerned the killing of some 116 Muslims in order to expel the Muslim population from a village, the ICTY found:

“Persecution is only one step away from genocide – the most abhorrent crime against humanity – for in genocide, the persecutory intent is pushed to its utmost limits through the pursuit of the physical annihilation of the group or of members of the group. In the crime of genocide the criminal intent is to destroy the group or its members; in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental human rights. In the present case, according to the Prosecution – and this is a point on which the Trial Chamber agrees – the killing of Muslim civilians was primarily aimed at expelling the group from the village, not at destroying the Muslim group as such. This is therefore a case of persecution, not of genocide.”

(iv) *Case-law of the International Court of Justice*

45. In its judgment of 26 February 2007 in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* (“Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide”), the International Court of Justice (ICJ) found under the heading of “intent and ‘ethnic cleansing’” (at § 190):

“The term ‘ethnic cleansing’ has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case ... General Assembly resolution 47/121 referred in its Preamble to ‘the abhorrent policy of “ethnic cleansing”, which is a form of genocide’, as being carried on in Bosnia and Herzegovina. ... It [i.e., ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as ‘ethnic cleansing’ may never constitute genocide, if they are such as to be characterized as, for example, ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while ‘there are obvious similarities between a genocidal policy and the policy commonly known as “ethnic cleansing”’ (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet ‘[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.’ ...”

(v) Interpretation by other Convention States

46. According to the material available to the Court, there have been only very few cases of national prosecution of genocide in other Convention States. There are no reported cases in which the courts of these States have defined the type of group destruction the perpetrator must have intended in order to be found guilty of genocide, that is, whether the notion of “intent to destroy” covers only physical or biological destruction or whether it also comprises destruction of a group as a social unit.

(vi) Interpretation by legal writers

47. Amongst scholars, the majority have taken the view that ethnic cleansing, in the way in which it was carried out by the Serb forces in Bosnia and Herzegovina in order to expel Muslims and Croats from their homes, did not constitute genocide (see, amongst many others, William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge 2000, pp. 199 et seq.). However, there are also a considerable number of scholars who have suggested that these acts did amount to genocide (see, *inter alia*, M. Lippman, *Genocide: The Crime of the Century*, HOUJIL 23 (2001), p. 526, and J. Hübner, *Das Verbrechen des Völkermordes im internationalen und nationalen Recht*, Frankfurt am Main 2004, pp. 208-17; G. Werle, differentiating in *Völkerstrafrecht*, 1st edition, Tübingen 2003, pp. 205, 218 et seq., pointed out that it depended on the circumstances of the case, in particular on the scope of the crimes committed, whether an intent to destroy the group as a social unit, as opposed to a mere intent to expel the group, could be proved).

(b) Universal jurisdiction for the crime of genocide*(i) The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)*

48. The relevant provisions of the Genocide Convention read:

Article I

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

Article VI

“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

(ii) *The 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute)*

49. The relevant provision of the ICTY Statute provides:

Article 9
Concurrent jurisdiction

“1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”

(iii) *Case-law of the International Criminal Tribunal for the former Yugoslavia*

50. The Appeals Chamber of the ICTY, in its decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in the case of *Prosecutor v. Tadić* (no. IT-94-1), stated that “universal jurisdiction [is] nowadays acknowledged in the case of international crimes” (§ 62).

51. Likewise, the Trial Chamber of the ICTY, in its judgment of 10 December 1998 in *Prosecutor v. Furundžija* (no. IT-95-17/1-T), found that [it] has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, “it is the universal character of the crimes in question ... which vests in every State the authority to try and punish those who participated in their commission” (§ 156).

(iv) *Domestic law and practice in other Convention States*

52. According to the information and material before the Court, including material submitted by the Government which has not been contested by the applicant, the statutory provisions of numerous other Convention States authorise the prosecution of genocide in circumstances comparable to those in issue in the present case.

53. In many Contracting States of the Convention, the prosecution of genocide is subject to the principle of universal jurisdiction, that is, jurisdiction for crimes committed outside the State’s territory by non-nationals against non-nationals of that State and which are not directed against the State’s own national interests, at least if the defendant was found to be present on its territory (for example Spain, France, Belgium (at least until 2003), Finland, Italy, Latvia, Luxembourg, the Netherlands (since 2003), Russia, Slovakia, the Czech Republic and Hungary). At the time of

the applicant's trial, numerous other States had authorised the prosecution of genocide committed abroad by foreign nationals against foreigners in accordance with provisions similar to the representation principle (*stellvertretende Strafrechtspflege* – compare Article 7 § 2 no. 2 of the German Criminal Code, paragraph 34 above), for example Austria, Denmark, Estonia, Poland, Portugal, Romania, Sweden and Switzerland (since 2000). Convention States which do not provide for universal jurisdiction for genocide include, notably, the United Kingdom.

54. Apart from the Austrian, Belgian and French courts, it is in particular the Spanish courts that have already adjudicated on charges of genocide, relying on the principle of universal jurisdiction. The Spanish *Audiencia Nacional*, in its judgment of 5 November 1998 in the *Augusto Pinochet* case, held that the Spanish courts had jurisdiction over the case. On the subject of the scope of the Genocide Convention it stated:

“Article 6 of the Convention does not preclude the existence of judicial bodies with jurisdiction apart from those in the territory where the crime was committed or international tribunals. ... it would be contrary to the spirit of the Convention ..., in order to avoid the commission with impunity of such a serious crime, to consider that this Article of the Convention limits the exercise of jurisdiction, excluding any jurisdiction other than those envisaged by the provision in question. The fact that the Contracting Parties have not agreed on universal jurisdiction over the crime for their respective national jurisdictions does not preclude the establishment, by a State which is a party to the Convention, of such jurisdiction over a crime which involves the whole world and affects the international community and indeed all of humanity directly, as stated in the Convention itself. ... Neither do the terms of Article 6 of the Convention of 1948 constitute an authorisation to exclude jurisdiction for the punishment of genocide in a State Party such as Spain, whose law establishes extraterritoriality with regard to prosecution for such crimes ...” (International Law Reports, vol. 119, pp. 331 et seq., at pp. 335-36)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (a) AND ARTICLE 6 § 1 OF THE CONVENTION

55. The applicant complained that his conviction for genocide by the Düsseldorf Court of Appeal, as upheld by the Federal Court of Justice and the Federal Constitutional Court, which he alleged had no jurisdiction over his case, and his ensuing detention amounted to a violation of Article 5 § 1 (a) and Article 6 § 1 of the Convention, the relevant parts of which provide:

Article 5

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;”

Article 6

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal established by law. ...”

56. The Government contested that submission.

A. Admissibility

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) **The applicant**

58. The applicant took the view that there was a general rule of public international law, namely the duty of non-intervention, which, in principle, prohibited the German courts from prosecuting a foreigner living abroad for genocide purportedly committed by him in a foreign country against foreign victims. In his submission, the German courts were also debarred from exceptionally assuming jurisdiction in accordance with the international criminal law principle of universal jurisdiction enshrined in Article 6 no. 1 of the Criminal Code, as jurisdiction in accordance with that principle was not recognised internationally in the case of genocide.

59. The applicant argued in particular that, pursuant to Article VI of the Genocide Convention, only the tribunal of the State in the territory of which the act was committed or an international tribunal had jurisdiction to try persons charged with genocide. That Article therefore reflected the duty of non-intervention flowing from the principle of sovereignty and equality of all States, and the prohibition of an abuse of rights, which were general rules of public international law. He conceded that the principle of universal jurisdiction, as recognised in customary public international law, could, in

theory, confer jurisdiction on a national court other than the one named in Article VI of the Genocide Convention. However, he maintained that jurisdiction in accordance with that principle, being an exception to the rule of the duty of non-intervention, was neither recognised in international treaty law nor in customary international law for the purpose of trying persons charged with genocide. The German courts had therefore arbitrarily assumed jurisdiction.

(b) The Government

60. In the Government's submission, the German courts had been the "competent court[s]" within the meaning of Article 5 § 1 (a) of the Convention to convict the applicant and the "tribunal[s] established by law" within the meaning of Article 6 § 1 of the Convention. German criminal law had been applicable to the facts of the case so that, in accordance with German law, German courts had had jurisdiction over the offences the applicant had been charged with. They had been competent under Article 6 no. 1 of the Criminal Code (in its version then in force). There had also been a legitimate link between the prosecution of the offences the applicant had been charged with and Germany itself, as considered necessary by the German courts beyond the wording of Article 6 no. 1 of the Criminal Code in order to establish jurisdiction, thus respecting the principle of non-intervention. The applicant had lived in Germany for many years, was still registered with the authorities as living there and had been arrested on German territory. Moreover, Germany had participated in the military and humanitarian missions in Bosnia and Herzegovina. In addition to that, the requirements of Article 7 § 2 no. 2 of the Criminal Code, which incorporated the representation principle, had been met, particularly as neither the ICTY nor the criminal courts at the place of the crime in Bosnia and Herzegovina had requested the applicant's extradition.

61. The Government further took the view that the provisions of German law on jurisdiction conformed to the principles of public international law. In particular, as had been convincingly shown by the German courts, Article VI of the Genocide Convention, which laid down minimum requirements in respect of the duty to prosecute genocide, did not prohibit the tribunal of a State other than the one in the territory of which the act was committed from prosecuting genocide.

62. Moreover, the principle of universal jurisdiction as recognised in customary public international law authorised all States to establish jurisdiction over crimes against international law such as acts of genocide, which were directed against the interests of the international community as a whole, irrespective of where or by whom those crimes had been committed. Likewise, jurisdiction under the representation principle as laid down in Article 7 § 2 no. 2 of the Criminal Code did not contravene public

international law. The German courts had therefore been authorised to adjudicate on the applicant's case.

63. The Government submitted that the legislation and case-law of numerous other Contracting States to the Convention and the case-law of the ICTY expressly authorised the prosecution of genocide in accordance with the principle of universal jurisdiction.

2. *The Court's assessment*

(a) **Relevant principles**

64. The Court finds that the case primarily falls to be examined under Article 6 § 1 of the Convention under the head of whether the applicant was heard by a "tribunal established by law". It reiterates that this expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. "Law", within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (see, *inter alia*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of Article 6 § 1 (compare *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §§ 99 and 107-08, ECHR 2000-VII).

65. The Court further reiterates that, in principle, a violation of the said domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent to examine whether the national law has been complied with in this respect. However, having regard to the general principle according to which it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law (see, *mutatis mutandis*, *Coëme and Others*, cited above, § 98 *in fine*, and *Lavents*, cited above, § 114). In this respect the Court also reiterates that Article 6 does not grant the defendant a right to choose the jurisdiction of a court. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (see, *inter alia*, *G. v. Switzerland*, no. 16875/90, Commission decision of 10 October 1990, unreported, and *Kübli v. Switzerland*, no. 17495/90, Commission decision of 2 December 1992, unreported).

(b) **Application of the principles to the present case**

66. The Court notes that the German courts based their jurisdiction on Article 6 no. 1 of the Criminal Code, taken in conjunction with Article 220a

of that Code (in their versions then in force). These provisions provided that German criminal law was applicable and that, consequently, German courts had jurisdiction to try persons charged with genocide committed abroad, regardless of the defendant's and the victims' nationalities. The domestic courts had therefore established jurisdiction in accordance with the clear wording of the pertinent provisions of the Criminal Code.

67. In deciding whether the German courts had jurisdiction under the material provisions of domestic law, the Court must further ascertain whether the domestic courts' decision that they had jurisdiction over the applicant's case was in compliance with the provisions of public international law applicable in Germany. It notes that the national courts found that the public international law principle of universal jurisdiction, which was codified in Article 6 no. 1 of the Criminal Code, established their jurisdiction while complying with the public international law duty of non-intervention. In their view, their competence under the principle of universal jurisdiction was not excluded by the wording of Article VI of the Genocide Convention, as that Article was to be understood as establishing a duty for the courts named therein to try persons suspected of genocide, while not prohibiting the prosecution of genocide by other national courts.

68. In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts (see, in particular, paragraph 20 above), that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (compare paragraphs 20 and 54 above). However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention, there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law (see Articles 31 § 1 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969).

69. The Court observes in this connection that the German courts' interpretation of Article VI of the Genocide Convention in the light of

Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights and Fundamental Freedoms) and by the Statute and case-law of the ICTY. It notes, in particular, that the Spanish *Audiencia Nacional* has interpreted Article VI of the Genocide Convention in exactly the same way as the German courts (see paragraph 54 above). Furthermore, Article 9 § 1 of the ICTY Statute confirms the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries. Indeed, the principle of universal jurisdiction for genocide has been expressly acknowledged by the ICTY (see paragraphs 50-51 above) and numerous Convention States authorise the prosecution of genocide in accordance with that principle, or at least where, as in the applicant's case, additional conditions – such as those required under the representation principle – are met (see paragraphs 52-53 above).

70. The Court concludes that the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide.

71. It follows that the applicant's case was heard by a tribunal established by law within the meaning of Article 6 § 1 of the Convention. There has therefore been no violation of that provision.

72. Having regard to the above finding under Article 6 § 1, namely, that the German courts had reasonably assumed jurisdiction to try the applicant on charges of genocide, the Court concludes that the applicant was also lawfully detained after conviction "by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. Accordingly, there has been no violation of that Article either.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

73. The applicant claimed that, due to the Düsseldorf Court of Appeal's refusal, on the basis of Article 244 § 5 of the Criminal Code, to call any witness for the defence who would have had to be summoned abroad, he had not had a fair trial within the meaning of Article 6 §§ 1 and 3 (d) of the Convention. He further complained that the refusal of the Court of Appeal to inspect the purported scene of the crime in Grabska or to have a topographical map drawn up also amounted to a violation of Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, read as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

74. The Government contested that submission.

A. The parties’ submissions

1. The Government

75. In the Government’s submission, the applicant had not exhausted domestic remedies in respect of his objection to the Court of Appeal’s refusal to call twenty-eight witnesses in the proceedings before the Federal Court of Justice on the ground that he had not sufficiently substantiated his complaints. They further argued that the applicant had not in any way raised his complaint about the Court of Appeal’s refusal to inspect the purported scene of the crime in Grabska in the proceedings before the Federal Court of Justice and had therefore also failed to exhaust domestic remedies in that respect.

76. The Government further claimed that the applicant could no longer claim to be the victim of a violation of his Convention rights and that the application was incompatible *ratione personae* with the Convention in so far as his complaints related to requests to take evidence in respect of the charge of the murder of twenty-two people in Grabska. They argued that the criminal proceedings against the applicant had been reopened and discontinued in respect of these offences.

77. The Government submitted that, in any event, the applicant’s right to a fair trial under Article 6 of the Convention had not been violated. The Court of Appeal had taken evidence in compliance with the requirements of that provision. Pursuant to Article 244 of the Code of Criminal Procedure in particular, the same rules for the taking of evidence applied both to the prosecution and the defence. Under the German Code of Criminal Procedure, it was for the criminal courts themselves to investigate the truth of their own motion. Even though the investigation into offences committed abroad raised considerable procedural problems, the defendants were protected by the rules on criminal procedure and by having the benefit of the doubt.

78. In the Government’s view, the Court of Appeal had not acted arbitrarily in dismissing the applicant’s requests to take further evidence. It had duly examined the applicant’s requests and had given objectively justified reasons for dismissing them. Its conclusion under Article 244 § 5

of the Code of Criminal Procedure that the summoning of the witnesses named by the applicant was not necessary in the circumstances of the case for ascertaining the truth did not disclose any error of law and the Court of Appeal had given full reasons for its decisions.

2. The applicant

79. The applicant contested the Government's view. He stressed that the Federal Constitutional Court had not dismissed his complaint for lack of exhaustion of domestic remedies and maintained that he had not lost his status of victim of a violation of Article 6 of the Convention.

80. The applicant complained that Article 6 §§ 1 and 3 (d) of the Convention had been violated in that, under Article 244 § 5, second sentence, of the Code of Criminal Procedure, the Court of Appeal had refused to call all twenty-eight defence witnesses named by him who would have had to be summoned abroad, whereas it had called and examined six witnesses named by the prosecution who had been summoned abroad. He maintained that in the circumstances of his case the Court of Appeal, had it used its discretionary powers correctly, would have been debarred from applying Article 244 § 5 of the Code of Criminal Procedure. The said provision laid down preconditions for refusing to call a witness who had to be summoned abroad which were less strict than those applicable to a refusal to call witnesses living in Germany. It was based on the assumption that for criminal trials in Germany, evidence could mainly be obtained in Germany. However, in his case, which concerned acts purportedly committed in Bosnia and Herzegovina, as a rule all the witnesses lived abroad. The application of Article 244 § 5 of the Code of Criminal Procedure had therefore been arbitrary. If the Court of Appeal had called the witnesses named, it would immediately have found that the witness for the prosecution concerning the alleged offences in Grabska had not told the truth.

B. The Court's assessment

81. The Court does not consider it necessary in the present case to rule on the Government's objections concerning the exhaustion of domestic remedies and the applicant's victim status since, even assuming that the applicant has exhausted domestic remedies and can still claim to be a victim of a violation of Article 6 of the Convention in all respects, it considers that the application is in any event inadmissible for the reasons set out below.

1. General principles

82. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the

evidence which the defendant seeks to adduce. More specifically, Article 6 § 3 (d) – which lays down specific aspects of the general concept of a fair trial set forth in Article 6 § 1 – leaves it to them, in principle, to assess, in particular, whether it is appropriate to call certain witnesses. It does not require the attendance and examination of every witness on behalf of the accused. However, it is the task of the Court to ascertain whether the taking and assessment of evidence violated the principle of a full “equality of arms”, rendering the proceedings as a whole unfair (see, *inter alia*, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B, and *Heidegger v. Austria* (dec.), no. 27077/95, 5 October 1999).

83. In cases arising from individual applications it is not the Court’s task to examine the domestic legislation in the abstract, but it must examine the manner in which that legislation was applied to the applicant in the particular circumstances (see, amongst others, *Sahin v. Germany* [GC], no. 30943/96, § 87, ECHR 2003-VIII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 86, ECHR 2003-VIII).

2. *Application of those principles to the present case*

84. The Court therefore has to determine whether the domestic courts’ application of Article 244 of the Criminal Code and their ensuing refusal to call certain witnesses, inspect the scene of the purported offence or have a topographical map drawn up rendered the proceedings as a whole unfair.

85. The Court observes at the outset that it is uncontested between the parties that Article 244 of the Criminal Code applies to all requests to call witnesses or to obtain other evidence, whether brought by the prosecution or the defence. In cases like the present one, in which the crime was committed outside Germany and in which it will, as a rule, prove necessary to obtain evidence from abroad, its application did not therefore generally favour applications to take evidence brought by the prosecution. Moreover, it is true that Article 244 § 5, second sentence, of the Code of Criminal Procedure lays down special conditions for rejecting an application to examine a witness – whether for the prosecution or for the defence – who would have to be summoned abroad. These conditions are indeed less strict than those for rejecting an application to hear evidence from a witness who can be summoned in Germany. However, these witnesses are not automatically treated as unobtainable evidence. The courts, pre-assessing the evidence before them, may, however, conclude that the examination of such a witness is not necessary for establishing the truth (see paragraph 39 above).

86. The Court further notes that the Court of Appeal, acting as a court of first instance, refused to call any of the twenty-eight witnesses living in Bosnia named by the applicant, while it summoned six prosecution witnesses abroad. However, this fact does not as such warrant the conclusion that the principle of equality of arms or the applicant’s right to

obtain the attendance of witnesses were disregarded, and that, consequently, the proceedings as a whole were unfair. In this respect, the Court observes in particular that the Court of Appeal, giving detailed reasons for the refusal to take further evidence, considered the written statements of at least seven of the said twenty-eight witnesses to prove the same fact (namely the applicant's detention at the time of the offence) before concluding that the testimony of all twenty-eight witnesses would be of little evidential value and irrelevant in deciding the case. The Court observes that the Court of Appeal, when rejecting the applicant's request to call these witnesses, had already heard the testimonies of more than twenty witnesses, including that of two journalists who were not affected by the offences the applicant was charged with (and could therefore, as a rule, be considered as particularly credible). These witnesses, who could be cross-examined by the applicant, had all stated that they had seen the applicant outside prison during the time he claimed to have been detained. In these circumstances, the Court cannot find that the domestic courts acted arbitrarily in deciding that the testimonies of the witnesses named by the applicant to prove his detention at the time of the offence had not been relevant. Therefore, the Court finds no indication that the proceedings against the applicant were as a whole unfair.

87. As regards the applicant's complaint about the refusal of the Court of Appeal to inspect the purported scene of the crime in Grabska or to have a topographical map drawn up for the purpose of proving that the witnesses' submissions concerning the purported acts were untrustworthy, the Court finds that the Court of Appeal gave proper reasons for its decision why it considered the taking of this evidence to be unobtainable. Having regard to the fact that the Court of Appeal had a video of the relevant locality and that the applicant could question the conclusiveness of the evidence taken in respect of the acts in question, the Court finds no indication that the failure to take additional evidence was incompatible with Article 6 §§ 1 and 3.

88. It follows that the applicant's complaints under Article 6 §§ 1 and 3 (d) of the Convention must be dismissed as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

89. The applicant further complained that the wide interpretation of the crime of genocide, as adopted by the German courts, did not have a basis in the wording of that offence as laid down in German and public international law, and that the German courts arbitrarily found that his guilt was of a particular gravity. He claimed that his conviction therefore amounted to a breach of Article 7 § 1 of the Convention, which provides:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international

law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

90. The Government contested that argument.

A. Admissibility

91. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

92. The applicant stated that a conviction for genocide under Article 220a of the Criminal Code required proof that the offender had acted with intent to destroy, in whole or in part, a national, racial, ethnical or religious group as such. He maintained that, having regard to the literal meaning of the term “destroy”, a mere attack on the living conditions or the basis of subsistence of a group, as in the present case, did not constitute destruction of the group itself. The “ethnic cleansing” carried out by Bosnian Serbs in the Doboij region had been aimed only at driving all Muslims away from that region by force, that is, at expelling that group, not destroying its very existence. It therefore could not be considered as genocide within the meaning of Article 220a of the Criminal Code.

93. Furthermore, according to the applicant, the German courts' interpretation of “intent to destroy” in Article 220a, which had been included in the Criminal Code in order to incorporate the Genocide Convention into national law, was contrary to the interpretation of the same notion in Article II of the Genocide Convention as adopted by the community of States. In fact, according to the internationally accepted doctrine, genocide applied only to cases in which murder, extermination or deportation was carried out with intent to eliminate a narrowly defined group, that is, to destroy it in a biological-physical sense, not merely as a social unit. The ethnic cleansing in the former Yugoslavia could not be compared to the extermination of Jews committed during the Nazi regime, which had been the reason for creating the Genocide Convention.

94. The applicant claimed that it had not therefore been foreseeable for him at the time of the commission of his acts that the German courts would qualify them as genocide under German or public international law.

95. Likewise, according to the applicant, the German courts' finding that his guilt was of a particular gravity amounted to a violation of Article 7 § 1 of the Convention in that the courts did not take into consideration that he had played only a minor role in the purported genocide in Bosnia.

(b) The Government

96. In the Government's view, the German courts' interpretation of the notion of "genocide" was not in breach of Article 7 § 1 of the Convention. The wording of the offence of genocide in Article 220a of the German Criminal Code permitted interpreting the notion of genocide as comprising acts committed with intent to destroy a group as a social unit. In particular, the intent to destroy had to be directed against the "group as such", which suggested that not only the physical, but also the social existence of the group was protected. Moreover, the definition of genocide laid down in Article 220a § 1 no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) did not entail the physical destruction of living members of the group in question either.

97. For the same reasons, the wording of Article II of the Genocide Convention, which corresponded to Article 220a of the Criminal Code, did not restrict the offence of genocide to the physical-biological destruction of the group in question. This was confirmed by numerous scholars and by the United Nations General Assembly, which interpreted the Genocide Convention so as to comprise the protection of a group as a social unit (see paragraph 41 above).

98. As the German courts' interpretation of the offence of genocide was compatible with the wording of Article 220a of the Criminal Code, the domestic courts' interpretation had been foreseeable at the time the applicant committed the offence in 1992. Moreover, German scholars had by then taken the view that criminal liability for genocide was also aimed at protecting the social existence of groups (see paragraph 36 above).

99. The Government conceded that in its judgment of 2 August 2001 in the case of *Prosecutor v. Krstić*, the Trial Chamber of the ICTY, as upheld on appeal, had expressly rejected the Federal Constitutional Court's interpretation of the notion of "intent to destroy" in its judgment in the present case. Relying on the principle of *nullum crimen sine lege*, the ICTY had argued for the first time that the offence of genocide under public international law was restricted to acts aimed at the physical or biological destruction of a group. However, this narrower interpretation of the scope of the crime of genocide by the ICTY in 2001 – which, in the Government's view, was not convincing – did not call into question the fact that it had been foreseeable for the applicant, when he committed his offences in 1992, that these would be qualified as genocide. In any event, the German courts had not qualified ethnic cleansing in general as genocide, but had found that

the applicant, in the circumstances of the case, was guilty of genocide as he had intended to destroy a group as a social unit and not merely to expel it.

2. *The Court's assessment*

(a) **General principles**

100. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. It is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, *inter alia*, *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-35, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-33, Series A no. 335-C; and *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

101. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, *inter alia*, *S.W. v. the United Kingdom*, cited above, § 36; *C.R. v. the United Kingdom*, cited above, § 34; *Streletz, Kessler and Krenz*, cited above, § 50; and *K.-H.W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II).

102. As regards the interpretation and application of domestic law, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, *mutatis mutandis*, *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II, and *Streletz, Kessler and Krenz*, cited above, § 49). While the Court's duty, in accordance with Article 19 of the Convention, is to ensure

the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *mutatis mutandis*, *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140, and *Streletz, Kessler and Krenz*, cited above, § 49).

(b) Application of the principles to the present case

103. In the light of the above principles, the Court therefore needs to decide whether the national courts' interpretation of the crime of genocide under German law, notably of the genocidal "intent to destroy", so as to cover the applicant's acts committed in the course of the ethnic cleansing in Bosnia and Herzegovina was consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time.

104. In determining, firstly, whether the German courts' interpretation was consistent with the essence of the offence of genocide, the Court observes that the domestic courts did not construe the scope of that offence narrowly. They considered that the "intent to destroy" a group within the meaning of Article 220a of the Criminal Code, as interpreted also in the light of Article II of the Genocide Convention, did not necessitate an intent to destroy that group in a physical or biological sense. It was sufficient that the perpetrator aimed at destroying the group in question as a social unit.

105. The Court notes that the domestic courts construed the "intent to destroy a group as such" systematically in the context of Article 220a § 1 of the Criminal Code as a whole, having regard notably to alternatives no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) of that provision, which did not necessitate a physical destruction of living members of the group in question. The Court finds that the domestic courts' interpretation of "intent to destroy a group" as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars (see paragraphs 36 and 47 above), is therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code and does not appear unreasonable.

106. Furthermore, the Court, like the national courts, considers it necessary, in order to determine the essence of the offence of genocide, to take into consideration also the codification of the prohibition of genocide in Article II of the Genocide Convention, for the observance of which Article 220a had been incorporated into the Criminal Code and in the light of which the said Article was to be construed. As the wording of Article 220a of the Criminal Code corresponds to that of Article II of the Genocide Convention in so far as the definition of genocide is concerned, the above reasoning with respect to the scope of the prohibition of genocide equally applies.

107. Moreover, the German courts' interpretation has not only been supported by a number of scholars at the relevant time of the commission of the crime (see paragraph 36 above), the United Nations General Assembly also agreed with the wider interpretation adopted by the German courts in the present case in its Resolution 47/121 of 18 December 1992, (see paragraph 41 above).

108. Consequently, the applicant's acts, which he committed in the course of the ethnic cleansing in the Doboij region with intent to destroy the group of Muslims as a social unit, could reasonably be regarded as falling within the ambit of the offence of genocide.

109. In deciding, secondly, whether the domestic courts' interpretation of the crime of genocide could reasonably be foreseen by the applicant at the material time, the Court notes that the applicant is the first person to be convicted of genocide by German courts under Article 220a since the incorporation of that Article into the Criminal Code in 1955. In these circumstances the Court finds that, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence which was – as in the present case – consistent with the essence of that offence must, as a rule, be considered as foreseeable. Despite this, the Court does not exclude that, exceptionally, an applicant could rely on a particular interpretation of the provision being taken by the domestic courts in the special circumstances of the case.

110. In the present case, which concerns the interpretation by national courts of a provision stemming from public international law, the Court finds it necessary, in order to ensure that the protection guaranteed by Article 7 § 1 of the Convention remains effective, to examine whether there were special circumstances warranting the conclusion that the applicant, if necessary after having obtained legal advice, could rely on a narrower interpretation of the scope of the crime of genocide by the domestic courts, having regard, notably, to the interpretation of the offence of genocide by other authorities.

111. The Court notes in this connection that at the material time the scope of Article II of the Genocide Convention, on which Article 220a of the Criminal Code is based, was contested amongst scholars as regards the definition of "intent to destroy a group". Whereas the majority of legal writers took the view that ethnic cleansing, in the way in which it was carried out by the Serb forces in Bosnia and Herzegovina in order to expel Muslims and Croats from their homes, did not constitute genocide, a considerable number of scholars suggested that these acts did indeed amount to genocide (see paragraph 47 above).

112. The Court further observes that – even after the applicant committed the impugned acts – the scope of genocide was interpreted differently by the international authorities. It is true that the ICTY, in its judgments in the cases of *Prosecutor v. Krstić* and *Prosecutor v. Kupreškić*

and Others, expressly disagreed with the wide interpretation of the “intent to destroy” as adopted by the United Nations General Assembly and the German courts. Referring to the principle of *nullum crimen sine lege*, the ICTY considered that genocide, as defined in public international law, comprised only acts aimed at the physical or biological destruction of a protected group. However, as the judgments of the ICTY – as well as further decisions concerning this subject matter taken by national and international courts, in particular the International Court of Justice (see paragraph 45 above), in respect of their own domestic or international codifications of the crime of genocide – were delivered subsequent to the commission of his offences, the applicant could not rely on this interpretation being taken by the German courts in respect of German law at the material time, that is, when he committed his offences.

113. In view of the foregoing, the Court concludes that, while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts. In these circumstances, the Court finds that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he committed in 1992. In this context the Court also has regard to the fact that the applicant was found guilty of acts of a considerable severity and duration: the killing of several people and the detention and ill-treatment of a large number of people over a period of several months as the leader of a paramilitary group in pursuit of the policy of ethnic cleansing.

114. Therefore, the national courts’ interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time. These requirements being met, it was for the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt. Accordingly, the applicant’s conviction for genocide was not in breach of Article 7 § 1 of the Convention.

115. As regards the applicant’s further complaint under Article 7 § 1 that the courts wrongly found that his guilt was of a particular gravity, the Court notes that the applicant’s submissions in this respect are limited to an allegation of factual and legal errors. They disclose neither an appearance of a breach of the said provision nor a breach of Article 6 § 1 of the Convention.

116. Accordingly, the Court concludes that there has been no violation of Article 7 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning the domestic courts' taking of evidence inadmissible and the remainder of the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 or Article 5 § 1 of the Convention in so far as the applicant complained of the German courts' lack of jurisdiction to try him on charges of genocide;
3. *Holds* that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 12 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President